# No. 12,543

IN THE

# United States Court of Appeals

## For the Ninth Circuit

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HERMAN H. ROSS,
*Appellant,*
vs.
THE BRITISH YUKON NAVIGATION COMPANY, LTD. (a Corporation),
*Appellee.*

(CONSOLIDATED)

MARTHA CORNELIA ROSS,
*Appellant,*
vs.
THE BRITISH YUKON NAVIGATION COMPANY, LTD. (a Corporation),
*Appellee.*

## BRIEF FOR APPELLEE.

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PERNAU-WALSH PRINTING CO., SAN FRANCISCO

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## BRIEF FOR APPELLEE.

---

### JURISDICTIONAL STATEMENT.

The appellee concurs in the Jurisdictional Statement contained in Appellants' Opening Brief.

## STATEMENT OF THE CASE.

The present appeal arises out of a collision which occurred on January 29, 1949 near Milepost 786, Alcan Highway, Yukon Territory, Dominion of Canada. The vehicles involved were a tanker truck owned by the British Yukon Navigation Company, hereinafter referred to as B.Y.N., driven by Balfour Keenan, and a Ford car owned and operated by Herman H. Ross of Anchorage, Alaska.

Separate actions against the B.Y.N. were filed by Herman H. Ross and his wife, Martha Cornelia Ross, who was a passenger in the Ross car at the time of the accident. The actions were filed in the District Court for the Fourth Judicial Division, Territory of Alaska, at Fairbanks, Alaska.

The defendant filed an answer in the Martha Ross case and an answer and counter-claim in the Herman Ross case. Prior to trial an order consolidating the cases for the purpose of trial was entered.

The cases were tried before a jury and a verdict was returned against the plaintiffs on their complaints and against the defendant on its counter-claim. Judgment was entered on the jury's verdict. Motions for new trial were filed by the plaintiff and denied. This appeal followed.

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## STATEMENT OF FACTS.

Although a statement of facts is contained in Appellants' Brief (pp. 2-6), it is considered necessary to

embody in this brief a statement of facts which more closely reflects the facts contained in the record and which is consistent with the verdict of the jury.

Balfour "Blondie" Keenan, driver of the B.Y.N. truck, was a Canadian citizen, 28 years of age, married, and had one child (R. 430-431). He had been employed by B.Y.N. as a truck driver since 1944 and had driven the Alcan Highway since it was built (R. 432). On January 29, 1949, in connection with his employment with B.Y.N., he left Whitehorse for Swift River. He was driving a 1947 Ford truck loaded with fuel oil (R. 432). The Ford truck he was driving was twenty-two feet long, seven and one-half feet wide. The load of oil weighed approximately five ton and the truck itself weighed three ton (R. 434). The truck had an Eton rear axle with under and direct gears (R. 435).

As Keenan drove down the highway and approached MP 787 he saw Jack Shiell (R. 435). Keenan stopped the truck and picked up Shiell. The road in the general neighborhood of MP 787 was hilly, winding, curving and had a lot of up-grades. Keenan had the truck in high and under so that the truck would have more power and so that the load could be held back against more compression. After picking up Shiell they proceeded on down the highway toward Dawson Creek (R. 436). As Keenan came down the hill approaching MP 786 he was in third and under gear because of a curve at the bottom of the hill to the right and if you drive too fast without holding

your load back the truck would tip over (R. 437-438). The truck made the curve to the right, proceeded down the straight of way and began to ascend the hill near MP 786. As it did so the engine speed of the truck died down and Keenan shifted to second and underdrive (R. 439). Keenan had been driving the truck ever since it had been bought—about a year (R. 500). He usually shifted into second and under gear when the truck speed was around twelve to fifteen miles per hour. As the truck went up the hill near MP 786 Keenan was on his right hand side of the road (R. 439). He was looking straight ahead and up the hill. After Keenan had shifted gears he saw the top of a grey car. In a second or two it came into full view. When it came into full view it was sweeping wide at the corner and well into the center line on Keenan's side of the road. Because of this Keenan pulled over until his right wheels were up against the snow bank just as far off the road as he could possibly get (R. 440). The car was 200 feet away when he first saw it. Keenan's speed when he first saw it was twelve to fifteen miles per hour (R. 461). Ross was going too fast when he tried to get around the corner—estimated speed of thirty-five to forty miles per hour. For a second Keenan thought that the car was going by. It passed awful close and he felt something bump. Keenan tried his brake and number one gear but the truck wouldn't hold and started to run back down hill over to his left hand side of the road (R. 441). After the impact the forward progress of the truck may have been a foot or two (R. 441-497).

After the truck had rolled back down to its left side of the road Keenan got out and went up to the Ross car which was sitting at an angle on the road (R. 442). The right front wheel of the Ross car was about 15-18 feet from the right hand side of the road as he walked up to it (R. 469) or about two to four feet from Mr. Ross' right hand side of the road as shown in Exhibit "L" as the car was headed toward Whitehorse (R. 511). After the accident Mr. Ross was standing across where the accident happened (R. 487). He was standing more on Keenan's side of the road across the center line of the road from his car (R. 443, 488).

Jack Shiell was picked up by Keenan between MP 787 and 788 and rode on down the highway with him (R. 516). As you approach MP 786 you come down off a gradual curve, cross a fill and culvert and then go up grade (R. 517). At the bottom of the hill the truck was in underdrive (R. 518). As the truck started up the hill the speed decreased and Keenan shifted gears (R. 518). The road between MP 770 and 800 is a crooked road up and down hill—the worst part of the Alcan Highway. There are very few trucks that can go through there unless in underdrive (R. 544). He was watching the right side of the road as the snow plow had plowed the snow out over the edge of the grade and you are likely to run over that and your wheels drop over and you can't get the truck back in the road (R. 548-549). He noticed the truck gradually going into the snow and looked ahead and saw a car coming a short distance away (R. 519, 542). It

was around the center of the road and looked like it was coming fast (R. 519). The car passed quite close to the truck, went out of sight and he then felt the impact (R. 520). He didn't know whether the truck stopped immediately or whether it rolled ahead a few feet (R. 542). Afterwards he saw glass and a headlight rim where the collision occurred about ten or eleven feet across the road from the Ross car and a little toward Whitehorse (R. 550-551). It was on the right hand side of the center line of the highway facing toward Watson Lake (R. 584).

The first vehicle to come along was B.Y.N. bus headed toward Whitehorse driven by N. L. Berg. It came by about twenty minutes after the accident (R. 445). Berg was driving a 22 passenger, Pony Cruiser, a cab over job, where the driver sits in the extreme front of the coach. Berg's bus had dual wheels (R. 596). As Berg approached the scene of the accident he was flagged down by Keenan (R. 597). He then drove down the road toward the car and tanker and as he did so he saw skid marks of the car quite clearly. He stopped near the grey car and then moved the bus forward again (R. 599). The bus was stopped this time quite close to front of the car so that the bus was sitting pretty well in front of the Ross car. He stopped as close as possible so that Mrs. Ross could be carried from the car to the bus (R. 599). He got out of the bus and walked around to the left side of his bus as it faced Whitehorse and looked around to see what had caused the accident (R. 600-601). He saw glass on the road and some discoloration (R. 601).

The discoloration was to the left of his bus as it faced Whitehorse and started at a distance from the snowbank (R. 632). He saw the truck tracks and observed where the right hand wheels of the truck were out in the snow. The forward progress of the truck from the point of impact was not over a foot or two (R. 601). He could see where the right dual wheel of the truck stopped in the snow. The truck tracks extended beyond the point of impact about the length of the truck (R. 602). The road at point of impact was wide enough that when he drove his bus up in front of the Ross car there was still some distance on the left side of his bus. The bus was eight feet wide (R. 641). Mr. and Mrs. Ross boarded his bus and drove to Teslin (R. 602, 603). In coming down the road to the Ross car the bus was pretty well to the center of the road and six tires would pass over the road (R. 623-624). Between the scene of the accident and Teslin he met Norman Hartnell who was driving a B.Y.N. bus toward Dawson. They both stopped and had a conversation (R. 603).

Norman Hartnell was the next person to arrive at the scene of the accident. He was driving a B.Y.N. bus from Whitehorse to Dawson (R. 671). He arrived at the scene of the accident between 1:00 and 1:30 (R. 677). At the scene he parked the bus he was driving on the left side of the road facing Dawson Creek. He got out and made an examination to determine the approximate point of impact (R. 673). The markings were quite plain. Opposite the highway by the car there were dark marks on the snow, a bit of

very fine glass and marking on the snow where some liquid had fallen. He could see where the right hand dual wheels of the truck driven by Keenan had been plowing against the snow bank on the right hand side of the road as you faced Dawson Creek (R. 674). The point of impact would be about eight feet from Keenan's right hand side of the road. Hartnell back-tracked the tracks of the truck to determine its position immediately preceding the impact. The truck tracks were well defined in the skiff snow on the right hand side of the road for some twenty to thirty feet back from the point of impact. The Ross car was slightly uphill but about directly across from the point of impact. The forward progress of the truck, after the impact was very slight (R. 675-687-889). Hartnell remained at the scene for about one-half hour (R. 677). When he left Jack Shiell accompanied him. The first vehicles they met after leaving the scene of the accident were two trucks belonging to Schmidt or North American Company (R. 678-679).

The next two vehicles past the point of impact were two George Schmidt trucks going toward Whitehorse. Both of these trucks as well as the busses driven by Berg and Hartnell had dual rear wheels (R. 450). The next vehicle to pass the scene was a 1948 Plymouth Sedan driven by a group of Canadian soldiers (R. 451-452). After the car had proceeded on down the highway Keenan got into his truck and sat there (R. 452). He dozed and the next person who arrived at the scene of the accident was Constable Shaw of the Royal Canadian Mounted Police (R. 453).

Shaw talked to Mr. Ross aboard the bus at Teslin in the presence of Mrs. Ross (R. 394). Mr. Ross, among other things told him that he was driving about twenty miles per hour (R. 395; 419). Mrs. Ross made a similar statement as to his speed to N. M. Keobke on February 1, 1950 (R. 429). Shaw proceeded to the scene of the accident. About two hours' time had elapsed from the time of the accident (R. 396; 407). His investigation was impaired by the fact that numerous vehicles had traveled past the vehicles involved and had obliterated the tire marks (R. 396; 413; 423). It would only take one big truck to obliterate the lot (R. 423). He noted a tire mark made by a truck when it had crowded off to the extreme right of the road. The mark was in eight to ten inches of loose snow and extended very little more than the length of the truck past the point of impact (R. 396; 410). These tire marks indicated that Keenan was about two feet from the edge of the shoulder to his right and that the distance from the left hand side of the truck driven by Keenan to his left hand side of the road would be approximately eleven feet (R. 396). The right hand wheels were in the snow off the plowed road. With the truck in that position there would be room for a car coming in the opposite direction to pass without collision (R. 409). He determined the point of collision by broken glass, anti-freeze and from oil that had leaked from somewhere (R. 412). In his opinion the accident occurred about the center of the road (R. 425). He examined the truck and ascertained that the drive shaft, the left spring hanger and the

brake line was broken (R. 412). Shaw took a number of photographs. Defendant's Exhibit 14, one of the photographs shows Keenan standing on the extreme right of the road at the termination of the tire marks made by his vehicle. Further down the hill on a spot slightly below the point of impact there is another man standing in the tire marks made by the B.Y.N. truck (R. 402). The man in the forefront of the picture is standing at the farthest point of mark made in the snow. The two men are standing at the beginning and end of the marks. The distance between the two men would be approximately thirty-five to forty feet (R. 415).

John Stevenson, camp Foreman, Department of Defense, Canadian Army, Brooks Brook, Mile 830, Alaskan Highway, lifted the Ross car with a wrecker and removed it to Teslin (R. 693-695). Keenan helped to hook the car up when it was taken away by the wrecker (R. 496). Taylor & Drury later hoisted the front end of the Ross car with a wrecker and towed it to Whitehorse (R. 780).

Errol Keobke was a master mechanic for B.Y.N., and had been a mechanic for thirty years. About the past seventeen years had been an automotive mechanic (SR. 3). He testified that Keenan was, on January 29, 1949, driving a 1949 three ton Ford, twenty-two feet in length and seven and one-half feet in width, equipped with an Eton two speed rear axle (SR. 3). The purpose of an underdrive is to give more power to the truck by increasing the gear ratio. As the gear

ratio increases the speed of the truck would increase. (SR. 4). A 1949 Ford Club Coupe would weigh 4,150 pounds and be 196.8 inches in length, 72.8 inches in width (SR. 27-28). The speed of a truck identical to the one driven by Keenan when in second and under-gear on a leval road would be approximately 13 miles per hour (SR. 11; 54). On examination the left rear wheel of the truck was bent and twisted. The tire had a 6 inch cut in it. The spring hangers were sheared off and the left rear spring was bent and twisted. There was an off-set of about three inches in the frame to the rear. The rear drive shaft had pulled out of the universal joint and the rear brake hose was broken. The truck frame was made of special alloy steel. The off-set in the frame was to the right of the truck (SR. 13). There were four universal joints on the drive shaft and at one of the joints the drive shaft was pulled out of the universal joint and had dropped to the ground (SR. 14-16). When the wheels turn the drive shaft would keep revolving to the left and if the truck went forward the drive shaft would gravitate to the left and eventually would swing around and come under the wheel and the truck would run over it (SR. 16). That section of the drive shaft was okeh when the truck was repaired (SR. 16-17). With the spring hanger sheared off the left rear wheel went back at least three inches and with the left rear wheel in this position the rear end of the truck would gravitate out to the left or the driver's side if the truck had gone forward. When the truck stopped and started backing down again the left rear wheel would be pushed

in the opposite direction and as the truck backed down it would have a tendency on that curve to go across the road (SR. 17). Ex. 16.

Errol Keobke had examined the Ross car and in his opinion it would have cost about $550.00 to $600.00 to put the car back into first class condition (SR. 30-34). Koebke was handed plaintiffs' Exhibit "C" (SR. 41). He testified that the Ross car had an overdrive (SR. 43; 45). The 1949 Ford two door Coupe has a fully automatic overdrive. An overdrive cuts down the engine speed for the miles per hour. It automatically changes the gear ratios in the rear end (SR. 43). An overdrive increases the speed approximately twenty-five per cent on the RPM of the engine (SR. 43-44). In an automatic overdrive you push the button on the dash in and when your car reaches approximately twenty-six miles per hour you let up on the accelerator pedal and it automatically slips in there, itself. Then if you want to go into direct drive again, push down the accelerator pedal until you contact a little switch underneath the accelerator pedal and that throws an electric solenoid on this transmission, that pulls it out then into direct gear. Then, if you get onto certain types of roads or in traffic—and, of course, it is not good policy to use your overdrive them—you pull this control on the dash all the way out and that locks it into direct gear or conventional drive (SR. 44).

When a truck is in for repairs the driver is off until the truck is repaired (SR. 54). So far as he knew Keenan was off work only three weeks (SR. 67).

There was no gutter on Ross' right hand side of the road (R. 407-Shaw) (R. 467-Keenan). The unplowed snow on Mr. Ross' right hand side was two and one-half to three feet deep (R. 407).

In his six years' experience as a truck driver Keenan had never had an accident prior to January 29, 1949.

Ross described the curve as a sharp curve (R. 220). Col. Walters described it as a long sweeping curve (R. 272; 289), and testified that he came into the curve at about twenty-seven and one-half miles per hour or at his normal driving speed (R. 289). Mr. Ross was driving twelve to fifteen miles per hour in second gear and had been in second gear for some time (R. 95). Ross, in a deposition taken August 30, 1949, testified that the truck was fifty or sixty or possibly seventy-five feet away when he first saw it (R. 222). At the trial he testified that the truck must have been 175 or 200 feet away when he first saw it. (R. 221).

Ross didn't mention that he had honked his horn in his deposition (R. 228; 238), nor in a list of question and answers subsequently prepared by him (R. 240-241), nor was this mentioned by Ross until November 12, 1950, after he had made a trip to Whitehorse with appellee's attorney, on which trip appellee's attorney sounded the horn on his car as he approached hills and curves (R. 240-242).

Dr. Haggland testified that Ross would have a seventy per cent chance of a perfect result (R. 806) and assuming such that he would be up and around

within six months after leaving the hospital. That after he recovered he thought Ross would be as good as new (R. 811). With reference to whether or not Ross was suffering a great deal of pain Dr. Haggland stated that, it being a subjective symptom that he merely had to take the patient's word for that (R. 808-809). He testified that if Ross had contacted him on February 4, that he would have treated him conservatively. That he would have put him to bed and put traction on both legs for a period of at least three or four weeks. If then free from pain and symptoms would have allowed him to get up and given him back support along with graduated exercises. If the symptoms persisted and were not alleviated he would recommend surgery (R. 812). He further testified that by myelogram he could, in most cases, definitely determine within an hour's time whether such person had a ruptured disc (R. 814). That before he would recommend surgery on Ross he should have a myelogram and if the diagnosis was confirmed surgery would follow and would improve his condition (R. 816).

On December 3, 1950 Dr. Haggland examined Mr. Ross (R. 798). In his testimony at page 801, Transcript of Record, Dr. Haggland stated: "The usual procedures of rest, graduated exercises, physiotherapy, back supports, have all been carried out." Presumably this statement is based upon the case history as given to Dr. Haggland by Mr. Ross. In reality, Mr. Ross had worn the brace since approximately December

1st. The record discloses no evidence that he took graduated exercises.

Mr. Ross testified that he hadn't been to see Dr. Martin except for X-ray pictures for some little time but was still under his care (R. 152), that Dr. Martin had prescribed baths, massaging and told him to just take good care of himself (R. 264, 265).

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## ARGUMENT AND AUTHORITIES.

### FIRST ARGUMENT.

**SPECIFICATION OF ERROR NUMBER ONE:**

> **The verdict, as rendered, was not supported by sufficient evidence but was contrary to the evidence.**

**SPECIFICATION OF ERROR NUMBER TWO:**

> **That the verdict, as rendered, was against the law.**

It is apparent from appellants' specifications of error numbers One and Two that this appeal is in fact, an attempt to reargue the entire case in the hope of inducing this Court to substitute its judgment for that of the trial jury. This is revealed by the indefinite and generalized nature of these specifications of error. They are not proper or sufficient specifications of error and should not be considered by this Court.

> Rule 20, 2(d), Circuit Court of Appeals, Ninth Circuit.

A violation of the Court rule justifies the Court in reviewing to consider the specifications which violate the rule.

> *Century Indemnity Company v. Nelson*, 9th Cir., 90 Fed. (2d) 644, 648.

Specifications of error that the Court erred in entering judgment on the verdict in that the verdict was against the law and unsupported by the evidence presented nothing for review.

> *Inland Power and Light Co. v. Grieger,* 9th Cir., 90 Fed. (2d) 811, 818;
>
> *Humphrey Coal Corporation v. Lewis,* 9th Cir., 90 Fed. (2d) 896, 898;
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> *Radius v. Travelers Insurance Company,* 9th Cir., 87 Fed. (2d) 412, 413;
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> *Mutual Life Insurance Co. of New York v. Wells Fargo Bank and Union Trust Co.,* 9th Cir., 86 Fed. (2d) 585, 587;
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> *Dalton Rubber Manufacturing Co. v. Sabra,* 9th Cir., 63 Fed. (2d) 865;
>
> *Hecht v. Alfaro,* 9th Cir., 10 Fed. (2d) 464, 466.

Without waiving our objections to the inadequate specifications of error, appellee will proceed to argue the points sought to be raised.

Appellants predicate their argument upon the mistaken assumption that the testimony offered in their behalf was the only testimony to be considered by the jury. Their arguments are not based upon the record but are predicated upon their opinion as to what the evidence was. They, in effect, request this Court to adopt their opinions as to the weight and credibility to be given to the testimony of the various witnesses and to completely disregard the conclusions reached by the jury. However, it is well settled that the jury

is the judge of the credibility of the witnesses and of the weight to be attached to the testimony of each.

In considering the testimony offered by plaintiffs in the present case the jury, together with other things, was entitled to consider that Herman Ross was seeking to recover a total of $45,655.58; Martha Cornelia Ross was seeking to recover a total of $30,773.80; that Charles Edward Baxter was employed by plaintiffs for the express purpose of helping them out in their cases and testified that he had agreed to do anything he could to help them (R. 744); and that Colonel Walters was not an eyewitness but based his testimony upon his attempt to reconstruct the accident (R. 295-296).

An impartial consideration of the entire record reflects that the contentions advanced by appellee are well founded and that the statement of facts contained in appellee's brief are based on the record. The testimony of Keenan, Shiell, Berg and Hartnell places the point of impact across the center line of the road on Keenan's right hand side and on appellants' left hand side of the road. It is readily apparent from the record that the testimony of the plaintiffs and the defendant was conflicting and, on many material points, was diametrically the opposite. The plaintiffs contended that they were on their extreme right hand side of the road and almost stopped when the truck, which allegedly was speeding and on its wrong side of the road, struck them. Defendant contended that its truck was on its extreme right hand side of the road travel-

ing at a low rate of speed when the plaintiffs' car, which was traveling at a high rate of speed and occupying the middle of the road, ran into its truck. The jury, as the triers of the fact, found that the evidence supported the defendant's theory of the case.

The cases cited and the arguments advanced by appellants on pages 12 to 18 of their Brief are not in point with the factual situation here presented. Admittedly the testimony in the case was conflicting, yet a consideration of the entire record reflects that the verdict was supported by substantial evidence. The appellants failed to prove their cases to the satisfaction of the jury by a preponderance of the evidence. The appellants have failed to call to this Court's attention the particular respects wherein they claim the verdict was not supported by the evidence or was contrary to law. They merely make these assertions and express their dismay over the fact that the jury elected to disbelieve the testimony advanced in their behalf.

If a verdict is supported by substantial evidence or based upon conflicting evidence from which different inferences might be drawn, leaving the Court doubtful, it will not ordinarily be disturbed. It is not a sufficient ground for a new trial that the verdict is against the preponderance of the testimony, or that the Court might have arrived at a different result. The verdict must be manifestly and palpably against the evidence.

Cyc. Fed. Proc. (2d Ed.) Volume 8, 125-126.

A verdict on conflicting evidence will not be disturbed on appeal.

*Lavender v. Kurn*, 327 U.S. 645;

*New York L.E.D.W.R. Co. v. Winters Adm'r.*, 143 U.S. 60;

*Aetna Life Insurance Co. v. Ward*, 140 U.S. 76.

The refusal of the Court below to set aside a verdict on the ground that it was against the weight of evidence cannot be reviewed on appeal.

*Home Insurance Co. of New York v. Barton*, 80 U.S. 603.

The denial of a motion for new trial is within the trial Court's sound discretion and hence not reviewable.

*Fairmount Glass Works v. Cub Fork Coal Co.*, 287 U.S. 474-484;

*Inland Power and Light Co. v. Grieger*, cited supra;

*Mutual Life Insurance Co. v. Wells Fargo Bank and Union Trust Co.*, cited supra;

*Dayton Rubber Co. v. Sabra*, cited supra.

With reference to the affidavit of Otto Menzel, filed by appellants in support of their motion for a new trial, it is apparent that the affidavit is an attempt to impeach the verdict of the jury and should not be considered.

*McDonald v. Pless*, 238 U.S. 264, 267, 269;

*Bateman v. Donovan*, 9th Cir., 131 Fed. (2d), 759, 764;

*Department of Water and Power of City of L. A. v. Anderson,* 9th Cir., 95 Fed. (2d) 577, 586;

*Spokane International Railway Company v. U. S.,* 9th Cir., 72 Fed. (2d) 430, 433.

With reference to appellants' assertion that the trial Court indicated its bias and prejudice in allowing the appellee excessive costs and attorney's fees, it is to be noted that a notice of taxation of costs was duly served on each appellant (see pages 4, 7, Appendix, Appellee's Brief). Costs were subsequently taxed without objection being taken by either appellant. In fixing the amount of attorney's fees it appears the same were computed in accordance with a proposed Court Rule (see page 1, Appellee's Brief). However, it seems that there is an error of One Hundred Dollars ($100.00) in the computation of the attorney's fees in the Herman H. Ross case and the amount thereof, after allowing him in offset the amount to which he was entitled by reason of his having prevailed on the counterclaim of the defendant, should be $828.28, instead of $928.28.

Taking into consideration the circumstances that the incident out of which these cases arose, occurred in the Dominion of Canada, that numerous depositions were necessarily taken, that the place of trial was away from the residence of the parties and attorneys, and the number of days spent in trial, it could more logically be contended that the amount allowed by the

Court for attorney's fees was inadequate rather than excessive.

Rule 54-D, Federal Rules of Civil Procedure provides:

> "(D). Costs. Except when express provision therefor is made either in a statute of the United States or in these rules, costs shall be allowed as of course to the prevailing party unless the Court otherwise directs * * *. Costs may be taxed by the Clerk on one day's notice. On motion served within five days thereafter, the action of the Clerk may be reviewed by the Court."

Section 55-11-55, Alaska Compiled Laws Annotated, 1949, provides, in part, as follows:

> "A party entitled to costs shall also be allowed all necessary disbursements, including the fees of officers and witnesses, the necessary expense of taking depositions, by commission or otherwise, * * *; witness fees for each day a witness is necessarily absent from his usual place of abode by reason of attendance upon court, with traveling expenses at 15c per mile actually and necessarily traveled * * *; and a reasonable attorney's fee to be fixed by the Court."

In view of the fact that appellant did not move against the cost bill or object to the costs as awarded by the trial Court and inasmuch as costs and attorney's fees were fixed in accordance with the pertinent provisions of the Federal Rules of Civil Procedure and Territorial Laws, it would seem that appellant's assertion in this regard is entirely without merit.

SPECIFICATION OF ERROR NUMBER TEN:

> The Court erred in overruling appellants' motions for a new trial, including the motions made and based upon newly discovered evidence.

This specification of error is not proper or sufficient and should not be considered.

> Rule 20, 2(d), Circuit Court of Appeals, Ninth Circuit;
>
> *Century Indemnity Company v. Nelson,* cited supra.

Without waiving the above objection, appellee will proceed to argue the point sought to be raised.

It is evident that the testimony of Joe Landry which was offered (R. 730-732) was not newly discovered and if believed by the jury, it might or might not tend to impeach the testimony of Constable Shaw. There is certainly no showing that the outcome of the trial would necessarily have been changed by the admission of such testimony.

Assuming for the purpose of argument, that the entire testimony of Constable Shaw had been excluded from the record it is submitted that the verdict of the jury would have been the same and that such verdict would be supported by substantial evidence. It is apparent from the record that Shaw arrived at the scene some two hours after the accident and that his investigation was seriously impaired by the fact that numerous vehicles had passed by. Shaw's testimony was not in the same category as that of Keenan and Shiell who were eyewitnesses, nor in the category of

the testimony of Berg and Hartnell who were the first and second persons, respectively, to arrive at the scene after the happening of the accident. Shaw's testimony would be more in the category of Lt. Col. Walters who arrived at the scene after considerable traffic had passed and who, like Shaw, based his testimony upon an attempt to reconstruct the accident.

To Landry's testimony the following objections were made:

> "Mr. Plummer. If the Court please, I object to this on the ground that it is hearsay.
>
> Mr. Bell. Well, it is impeaching Mr. Shaw, who testified in the case. It is for that purpose only.
>
> Mr. Plummer. If the Court please, there has been no foundation on the impeaching question. I object on the ground that there has been no foundation laid.
>
> The Court. Objection sustained." (R. 730).

> "Mr. Plummer. Object on the grounds it is incompetent, irrelevant and immaterial. Seeks to elicit hearsay testimony. There is no basis whatsoever laid—basis or foundation laid for an impeaching question." (R. 732).

Section 58-4-62, Alaska Compiled Laws Annotated, 1949, provides in part:

> "The witness may also be impeached by evidence that he has made at other times statements inconsistent with the present testimony; but before this can be done the statements must be related to him, with the circumstances of times,

places, and persons present; and he shall be asked whether he had made such statements, and if so, allowed to explain them."

The Advisory Committee's April, 1937 draft of the Federal Rules of Civil Procedure, as revised by its final report, November, 1937, the last sentence of Rule 26(f) read (the brackets have been supplied):

> "At the trial or hearing any party may rebut any relevant evidence contained in a deposition whether introduced by him or any other party [and, without having first called them to the deponent's attention, may show statements contradictory thereto made at anytime by the deponent]."

The Court, in its promulgating order of December, 1937, struck out the material enclosed in brackets and made a comparable change in the Advisory Committee's recommended Rule 43-B dealing with the scope of examination and cross examination.

In *Ayers v. Watson*, 132 U.S. 394, the Supreme Court, in an opinion by Mr. Justice Miller, stated:

> "The circumstances under which the former statements of a witness in regard to the subject matter of his testimony, when examined in the principal case, can be introduced to contradict or impeach his testimony, are well settled, *and are the same whether his testimony in the principal case is given orally in court before the jury or is taken by deposition and afterwards read to them.* (Emphasis supplied) In all such cases, even where the matter occurs on the spur of the moment in a trial before a jury, and where the objec-

> tionable testimony may then come for the first time to the knowledge of the opposite party, it is the rule that before those former declarations can be used to impeach or contradict the witness, his attention must be called to what may be brought forward for that purpose, and this must be done with great particularity as to time and place and circumstances, so that he can deny it, or make any explanation intending to reconcile what he formerly said with what he is now testifying * * *."

With respect to the deposition of C. C. Sommers, it is significant that no attempt was made to read the deposition into evidence at the trial nor was a formal offer of proof made thereof. From answers 6, 8 and 9 given by Sommers in his deposition it is impossible to determine whether the alleged statements were made by Keenan or McNair. Sommers' statement, "At the meeting he told *him* (emphasis supplied) to let's go see Slim Baxter and let Slim handle the deal and in the presence of Slim Baxter and his wife the above conversation was repeated," indicates that Sommers was talking to only one person. The testimony of Errol Keobke was to the effect that Keenan was off work as a result of the accident for only three weeks. Sommers states that the person with whom he was talking had been off work two or three months. Sommers stated the conversation was repeated in the presence of Slim Baxter and his wife. Baxter, during the taking of his deposition at Whitehorse, Yukon Territory, on October 31, 1949, testified, under oath, that Keenan

had not on any occasion admitted to him that he was responsible for the accident. (R. 137).

The alleged conversation occurred on Friday, June 17 or Saturday, June 18, 1949 around noon. Baxter was asked by Mr. Ross in April of 1949 to help him in connection with his case (R. 744). Mr. Ross testified that Baxter was his agent (R. 353). It would seem only logical to assume that Baxter, in his endeavor to help Mr. Ross, would have communicated the alleged conversation between Sommers and the truck driver to Mr. Ross shortly after June 17, 1949 and that Ross was aware of this conversation shortly thereafter.

On November 18, 1949 the plaintiffs served a notice upon the defendant that they would, by written interrogatories, take the deposition of C. C. Sommers on the 25th day of November, 1949 (R. 49B). On November 21, 1949 defendant served on plaintiffs a motion to vacate the notice to take the deposition of C. C. Sommers on the ground that proper notice had not been given in accordance with Rule 31-A, Federal Rules of Civil Procedure (R. 48-49A). The defendant's motion to vacate the notice to take deposition was granted on November 29, 1949 (R. 58).

The trial of these cases began on December 5, 1949 and ended on December 13, 1949. Plaintiffs knew on November 29, 1949 that defendant's motion had been granted. They therefore, had five full days prior to the beginning of the trial or fourteen days prior to the conclusion of the trial in which to get the witness Sommers to Fairbanks. Under present day methods of

communication and air travel this could easily have been accomplished. It would seem logical to assume that they would have done so had they considered his testimony as indispensable as they now assert it to be.

The alleged statements were made in the presence of Slim Baxter and his wife. Baxter was in attendance as a witness throughout the entire trial and testified on behalf of the plaintiffs in their case in chief and in rebuttal. There is no showing that his wife was not readily available as a witness. Certainly, had the appellants truthfully desired to avail themselves of the substance of Sommer's testimony they could have laid a proper foundation therefor by asking Keenan whether or not on the 17th or 18th day of June, 1949 at Whitehorse, Yukon Territory, at Slim Baxter's place in the presence of Sommers, Mrs. Baxter and Slim Baxter, he had made the alleged statements. If Keenan had denied such statements then Baxter or his wife, who were present when the alleged conversation was repeated, could have then been called to impeach Keenan's testimony.

The appellants apparently made no effort to have the witness Sommers personally present at the trial; they did not lay a foundation for such impeaching testimony while Keenan was on the witness stand. They did not offer to have the deposition read into evidence during the trial and consequently no formal offer of proof was made. Their entire course of conduct indicates that they actually had no intention or desire to have this testimony placed before the jury. To the contrary, it is indicative of a deliberate effort

on their part not to interject this testimony into the trial.

Assuming for the purpose of argument, that proper notice had been given in connection with the taking of this deposition, and further assuming, that a proper foundation had been laid and the deposition had been offered during the course of the trial, it clearly would have been inadmissible to impeach Keenan inasmuch as it fails completely to identify Keenan as the person who made the alleged statements to Sommers.

The Court may, in its discretion, allow a new trial or rehearing because of newly discovered evidence, provided it is satisfied that the evidence relied on is newly discovered in fact, and not such as could have been produced by the exercise of reasonable diligence at the former trial, and that the newly discovered evidence is such as will change the prior result.

Vol. VIII, Cyc. Fed. Pro. (2d Ed.) pp. 118-120.

It is well settled that a new trial will not be granted upon the ground of newly discovered evidence where it appears that such new evidence can have no other effect than to discredit the testimony of a witness at the original trial, contradict a witness' statement, or impeach a witness, unless the testimony of the witness who is sought to be impeached was so important to the issue, and the evidence impeaching the witness so strong and convincing that a definite result must necessarily follow.

39 Am. Jur., pp. 173-174.

The testimony of Landry and Sommers was not newly discovered. Landry's testimony was offered for

the sole purpose of impeaching Shaw. No foundation had been laid for the admission of such testimony. It is apparent that any claim of error founded upon the trial Court's refusal to grant a new trial, including the motions made and based upon alleged newly discovered evidence, is without merit.

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## SECOND ARGUMENT.

**SPECIFICATION OF ERROR NUMBER NINE:**

> **The Court erred in not declaring a mistrial by reason of the misconduct of appellee's counsel, Raymond E. Plummer, after strenuous objections had been made by appellants' counsel, Bailey E. Bell.**

**SPECIFICATION OF ERROR NUMBER FIFTEEN:**

> **The Court erred in not declaring a mistrial or in not reprimanding the counsel for appellee during the closing argument of appellants' attorney, wherein the appellee's attorney interrupted appellants' attorney at many intervals, and upon one occasion arose from his seat and shouted in very boisterous tones that the appellant, Herman H. Ross, was a perjurer and by so doing prevented the appellants from having a fair and impartial trial.**

The above specifications of error are too vague and indefinite to constitute a reviewable assignment of error.

> Rule 20, 2(d), Circuit Court of Appeals, Ninth Circuit;
>
> *Century Indemnity Company v. Nelson*, cited supra.

At pages 785-786 R., the following transpired:

"Mr. Bell * * * Your Honor, I have no desire to have the arguments taken, unless Mr. Plummer and Clasby does, *and if for any reason* that anyone wants to take an exception to the statement

of counsel, your Honor could call the reporter as far as I am concerned. (Emphasis supplied).

The Court. Very well.

Mr. Hurley. May it please the Court, are you ready for the argument now?

The Court. Yes.

Mr. Hurley. Before discussing the evidence in this case, I think it might be well to call your attention to the fact that this is a trial of two cases, one case in which Mr. Ross is the plaintiff and the British Yukon Navigation is defendant——(interrupted)

Mr. Plummer. Excuse me, Mr. Hurley, I just wanted, if the Court please, we will waive the reporting and if it is necessary to call—*any objection raised to counsel's argument the reporter may be called.* (Emphasis supplied)

The Court. Very well, you may be excused then."

The affidavit with reference to the fact that appellants made no objections to the argument made by appellee's counsel is not denied (R. 152). Nor is it elsewhere made to appear that the appellants made or interposed any objection to said argument. By reason of the above stipulation and by reason of their failure to have called the Court Reporter to record any objections, if in fact the argument was objectionable, when the matter was fresh in the minds of the Court and counsel such objections were waived.

This Court should not now consider the affidavits filed by appellants in support of their motions for new trial.

Rule 75-N, Federal Rules of Civil Procedure, provides as follows:

> "(N) Appeals when no stenographic report was made. In the event no stenographic report of the evidence or proceedings at a hearing or trial was made, the appellant may prepare a statement of the evidence or proceedings from the best available means, including his recollection, for use instead of a stenographic transcript. This statement shall be served on the appellee who may serve objections or propose amendments thereto within ten days after service upon him. Thereupon, the statement, with the objections or proposed amendments, shall be submitted to the District Court for settlement and approval and as settled and approved shall be included by the Clerk of the Court in the record on appeal."

Instead of following Rule 75-N, appellants have supported their motions with voluminous affidavits. Such affidavits, upon which appellants place such great reliance, are subject to the inaccuracies of appellants' memory. This is clearly illustrated in the case of the affidavit of Herman H. Ross filed herein on January 6, 1950 (R. 120-121) in which Herman H. Ross unequivocally states that during the selection of the jury, Patrick H. O'Neil was asked by appellants' attorney, Bailey E. Bell, whether he was at the time being represented either directly or indirectly by any of counsel for the defendant and that said Patrick O'Neil either stated that he was not or remained silent. The transcript of record shows that no such or similar question was asked this juror (R. 43-47).

In *Lemley v. Christophersen,* 5th Cir., 150 Fed. (2d) 291, the appellant, in his brief, argued two grounds in connection with a motion for new trial relating to the argument of opposing counsel before the jury. The grounds were attempted to be supported by an affidavit of appellants' counsel but opposing counsel took issue as to what occurred. The Court, in its opinion, stated:

> "Rule 75 seems to permit appellant to relate initially his own record of proceedings, subject to objections to opposing counsel and settlement by the Judge, but is carrying the looseness of reform too far to sanction what is here attempted. The motion for a new trial is but an appeal to the presiding Judge for an exercise of his discretion to grant one, and his refusal is not ordinarily reviewable on appeal. The recitals in the motion of what happened in the trial, not certified by the Judge or conceded by opposing counsel, do not constitute a record of the proceedings upon which the Appellate Court may act."

If, however, the voluminous affidavits filed by appellants in support of their motions for new trial are considered by this Court it is respectfully requested that the affidavits filed by appellee in connection with such motions (R. 112-119); (R. 136-139); (R. 140-157); (R. 177-179), together with the written decision on motion for new trial filed by the trial Court also be considered.

Without waiving the foregoing objections appellee will proceed to argue the points sought to be raised.

Counsel has a right to interpose, during the argument of adverse counsel, to object to his mistating the evidence or transcending the limits of argument. Moreover, in order to base error thereon, the attention of the Court must be called to improper argument at the time it is made, by objecting thereto and obtaining a rule thereon. If the Court holds the objection to be admissible, he must be requested to reprimand the counsel and admonish and instruct the jury in reference thereto. Generally the argument must be interrupted at the moment it is made; to delay until the end of the argument is generally fatal to the objection. One who claims to be prejudiced by such improper and prejudicial remarks of counsel must object to same and obtain a ruling of the Court thereon.

Abbott's Civil Jury Trials, 5 Ed. 773-774.

Counsel for defense cannot as a rule remain silent, interpose no objections and after a verdict has been returned seize for the first time on the point that the comments to the jury were improper and prejudicial.

*U. S. v. Socony Vacuum Oil Company,* 310 U.S. 150;

*Crumpton v. U. S.,* 138 U.S. 361-364;

*Thomson v. Bowles,* 8th Cir., 123 Fed. (2d) 487, 495;

*Continental Casualty Co. v. Pouquette,* 9th Cir., 28 Fed. (2d) 958, 960.

Objections to improper argument of counsel cannot be reviewed in the absence of a ruling by the trial Court on a demand therefor.

> *Odell Manufacturing Co. v. Tibbetts,* 1st Cir., 212 Fed. 652;
>
> *Toledo S. T. & W. R. Co. v. Howe,* 6th Cir., 191 Fed. 776.

Assuming for the purpose of argument, that the gross misconduct of appellee's counsel assumed the unbelievable proportions now attributed to it by appellants, it is equally unbelievable that appellant, Herman H. Ross, himself an attorney, and his very able attorneys, Bailey E. Bell, Julian A. Hurley and Mike Stepovich, Jr., sat by silently and never during the course of appellee's counsel's argument interposed a single objection. It is apparent from the number of objections raised by appellants' counsel during the course of the trial that they had no aversion toward interposing objections. The fact that no objections were made during the course of the argument of appellee's counsel is somewhat conclusive that appellants' counsel considered the same entirely proper and not objectionable in any respect.

The Court, in Instruction Ten (R. 82) instructed the jury as follows:

> "You should not permit the remarks or expressions of opinion by the attorneys in the case to influence your judgment unless the same are in conformity with the evidence or are logical deductions therefrom."

It is presumed that the jury followed this instruction and in view of the fact that appellants failed to interpose any objections to the conduct that they now assert was prejudicial there is plainly no error on the part of the Court for not declaring a mistrial of its own volition.

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## THIRD ARGUMENT.

SPECIFICATION OF ERROR NUMBER THREE:

> **That the case of Martha Cornelia Ross, one of the above named appellants, was not considered at all by the jury in arriving at its verdict.**

SPECIFICATION OF ERROR NUMBER THIRTEEN:

> **Error of the Court in refusing to give competent, proper and correct instructions offered by the appellants.**

The affidavit of Otto Menzel should not be considered for the purpose of impeaching the verdict of the jury.

*McDonald v. Pless,* cited supra;

*Bateman v. Donovan,* cited supra;

*Department of Water and Power, City of L. A. v. Anderson,* cited supra;

*Spokane International Railway Company v. U. S.,* cited supra.

The trial Court in its instructions Five and Six (R. 73-77) explicitly instructed the jury that two separate cases were being tried, pointed out the difference and instructed that each case should be considered separately. Apparently the appellants were satisfied that the instructions given by the Court

adequately distinguished the two cases inasmuch as the two instructions requested certainly did not, to any extent, more clearly define the issues of the two cases.

Mr. Hurley, in his address to the jury stated:

> "Before discussing the evidence in this case, I think it might be well to call your attention to the fact that this is a trial of two cases, one case in which Mr. Ross is the plaintiff and the British Yukon Navigation, a corporation, is the defendant * * *." (R. 785).

There is no showing that the jury did not follow the Court's instructions and the admonition contained in Mr. Hurley's argument. In the absence of a showing to the contrary the presumption is that the jury followed the Court's instructions.

Plaintiffs' requested Instruction Number 2 (R. 69) is not a correct statement of the law applicable to the facts of this case in that it fails, among other things, to take into consideration the effect of contributory negligence on the part of the plaintiff, Martha Ross, and does not take into consideration the fact that it was necessary for the jury to find for Martha Cornelia Ross by a preponderance of all the evidence before a verdict could be returned in her favor.

With respect to plantiffs' requested Instruction Number 1 (R. 68), a reading of the defendant's Answer in Cause No. 6113 (R. 14-23) and the Answer in Cause No. 6129 (R. 24-32), makes it appear that the pleadings meet the requirement of Rule 8-B and Rule

14-B, Federal Rules of Civil Procedure, and that the plaintiffs' contention that the answers constitute a negative pregnant is without merit.

The Court properly refused to give plaintiffs' requested Instructions One and Two in that they are not correct statements of the law applicable to the facts of this case.

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## FOURTH ARGUMENT.

SPECIFICATION OF ERROR NUMBER FIVE:

> The Court erred in allowing incompetent evidence to be introduced on the part of the appellee, over objections of the appellants, as shown by the transcript of the testimony and all Court proceedings.

SPECIFICATION OF ERROR NUMBER SIX:

> The Court erred in refusing to strike the testimony of the appellee upon motion of the appellants in many instances as is shown by the transcript of the record and Court proceedings on file in this case.

SPECIFICATION OF ERROR NUMBER SEVEN:

> The Court erred in sustaining objections to appellants' offered testimony in many instances when said testimony was competent, relevant and material to the issues in this case.

The above specifications of error are not proper or sufficient specifications of error and should not be considered.

> Rule 20, 2(d), Circuit Court of Appeals, 9th Circuit;
>
> *Century Indemnity Co. v. Nelson*, 9th Cir., cited supra;
>
> *Jung v. Bowles*, 9th Cir., 152 Fed. (2d) 726.

Without waiving this objection appellee will proceed to argue the points sought to be raised.

With respect to the question asked Mr. Ross (R. 763) (Appellants' Brief 42, 43) it is obvious that the question called for a conclusion on the part of the witness and an objection on that ground having been interposed, the trial Court correctly sustained the objection.

With respect to the proceedings at page 765, Transcript of Record (Appellants' Brief 43) it is believed that the ruling of the trial Court was correct in view of the following testimony given during the examination of Herman H. Ross, which appears at page 254, Transcript of Record:

> "By Mr. Plummer. Q. Now do you have any recollection of both Mr. Berge or Mr. McClary, the Postmaster at Teslin, or either of them, trying to persuade you to charter a plane and fly Mrs. Ross from Teslin to Whitehorse?
>
> A. No, I never heard of that.
>
> Q. That they would make the necessary arrangements with the R.C.A.F.—the Air Force over there?
>
> A. That is the first I heard of that, because I would have gone right away for that in a hurry.
>
> Q. You are sure of that?
>
> A. I don't recall anything like that. In fact, I think I inquired to see if there was any way I could get on a plane, and I don't recall them making any such statement, because I would have jumped at it."

With respect to the proceedings which occurred at page 766, Transcript of Record (Appellants' Brief 43-44), appellants make reference to the testimony of

Mr. Keenan at pages 442-444, Transcript of Record. The testimony of Keenan on those pages in substance, is to the effect that Mr. Ross made a statement, "Never mind my wife, look at my new car"; that he got in the car beside Mrs. Ross; that he picked up some kleenex and held it on Mrs. Ross' head; that Mr. Ross was going to pick up a headlight rim and that Keenan stated "No, Mr. Ross, you had better leave that there until the Mountie comes".

At page 756, Transcript of Record, on rebuttal, in response to questions put to him by attorney, Bailey E. Bell, Herman Ross testified in substance that he had a conversation out on the road with Keenan after the accident; he denied that he started to reach down and pick up a headlight rim or that he was told not to do so until the Mountie got there. He testified that nothing whatsoever happened like that (R. 759); he further denied that he made the statement, "Never mind my wife, look at my new car", and definitely stated that nothing like that took place (R. 759). He denied that Keenan had sat in the car by the side of Mrs. Ross (R. 760); he denied that Keenan had obtained kleenex and applied it to Mrs. Ross' face and stated that Keenan had not handled the kleenex in any way and that he never got close enough to the car to touch the kleenex (R. 760). It would, therefore, appear that appellant was not prevented from making his proof on this point, that the matter had been gone into fully at least once, and that the ruling of the trial Court was correct.

In this regard the Court's attention is called to the testimony of Mrs. Ross, on direct examination on rebuttal at pages 748 to 749, Transcript of Record, in response to questions put to her by attorney Bailey E. Bell, she stated in substance, that the conversation wherein Keenan contended Mr. Ross made the statement, "Never mind my wife, look at my new auto", did not take place; that Keenan did not get into the car beside her or sit inside the door at all; that Keenan did not put any kleenex on her face at all and that the closest he got to the car was some four or five feet.

With respect to the question to Mr. Ross by Mr. Bell on direct examination on rebuttal, Transcript of Record 767 (Appellants' Brief 44) appellee again called the Court's attention to the testimony of Mr. Ross at page 254, Transcript of Record. In view of this testimony it appears that the ruling of the trial Court was correct.

With respect to the proceedings at page 770, Transcript of Record (Appellants' Brief 44), appellants call the Court's attention to the testimony of Herman Ross, pages 148, 149, 762, 763, 764, 771, 772, Transcript of Record. The record thus shows that Herman Ross was permitted to testify fully in regard to his conversation with Constable Shaw.

Mr. Ross was present at the taking of Shaw's deposition on October 31, 1949. Shaw's testimony was presented to the jury by the reading of his deposition. Mr. Ross had a copy of this deposition which was made by Mr. Van Roggen's secretary (R. 404). He

knew, or should have known, what Shaw's testimony would be and if material portions of his conversation were omitted he should have offered the portions not mentioned by Shaw while testifiying as a witness in his own behalf in his case in chief.

With respect to the proceeding at page 772, Transcript of Record (Appellants' Brief 44-45) it is apparent that the question asked elicited hearsay answers which would not be binding on the defendant and the objections thereto were properly sustained.

With respect to the proceeding at page 773, Transcript of Record (Appellants' Brief 45-46), appellants claimed that the Court's refusal to admit the letter marked "Plaintiffs' Identification 31", which he claims was exactly the opposite of the testimony of Errol Keobke, was prejudicial. The letter is believed to be one written by Mr. Tubman, manager of the N. C. Co. at Whitehorse to Mr. Ross. Mr. Ross was present when Errol Koebke's deposition was taken on October 31, 1949 at Whitehorse. From that time on he was aware of the substance of Mr. Keobke's testimony. If appellants had desired this testimony they could have taken Mr. Tubman's deposition and presented his testimony in a proper manner. It is also apparent from the record of Errol Keobke's testimony that he was a qualified mechanic and that Mr. Tubman was not a mechanic but a parts man.

Furthermore, no prejudice resulted to appellant, as the substance of the desired testimony had been very artfully presented to the jury by Mr. Baxter, when at

page 353, Transcript of Record, he testified as follows:

> "A. When I went to see Mr. Tubman, Mr. Tubman told me he had written prior to that to Mr. Ross, that the car as far as they were concerned, was beyond repair; wasn't worth repair."

With respect to the proceedings at page 775, Transcript of Record (Appellants' Brief 46, 67), we quote from the record inasmuch as the same is inaccurately quoted in appellants' brief:

> "Mr. Bell. Exception. You may take the witness.
>
> The Court. Did you want to ask a question (to Juror O'Neill)?
>
> Juror O'Neill. Yes, may I? (*Judge nodded.*) (Emphasis supplied.) Mr. Ross, did you have insurance on your car?
>
> A. No sir, I did not. I was going to get insurance when I got to Anchorage.
>
> The Court. Well, this case will be in recess for ten minutes. The jury will be excused until called, and the case will be in recess for ten minutes. (*Whereupon, the trial of this case was recessed for ten minutes, while the Court heard other matters.*" (Emphasis supplied.)

It is apparent from the record that the trial judge nodded in response to Juror O'Neill's query, "Yes, may I?" and that Herman Ross, in response to the question asked by Mr. O'Neill, voluntarily, without any prompting on the part of the Court, and without objection by any of his counsel, proceeded to answer the question. There is nothing in the record to sup-

port Mr. Ross' assertion that he answered this question in response to a nod from the Judge. The answer being in the negative certainly could not have been prejudicial to him.

Nor can we, by any logical method, follow appellants' reasoning that the Court, having declared a recess for the purpose of taking up other matters was prejudicial to plaintiffs' case and that it was tantamount to a directed verdict for the defendant. Appellee calls the Court's attention to the fact the record shows that throughout the entire trial the Court took regular recesses. At page 727, Transcript of Record, the Court recessed for ten minutes. At page 756, Transcript of Record, the Court adjourned at 4:55 P.M. until 9 A.M. on December 13, 1949. On December 13, 1949 Herman Ross took the stand as a witness in his own behalf on rebuttal. At page 775 the Court declared the hourly recess and the trial was recessed while the Court heard other matters.

With respect to the proceedings on pages 776-777, Transcript of Record (Appellants' Brief 47-48), Mr. Ross, having testified to Constable Shaw's alleged statement to him, it is believed that the same was a proper subject of cross-examination. The jury was entitled to know Mr. Ross' reason for not having taken the deposition of Mr. Van Roggen for the purpose of impeaching Constable Shaw.

With respect to the proceedings at page 306, Transcript of Record (Appellants' Brief 48), the testimony sought to be elicited by the question to Mrs.

Ross was incompetent, irrelevant and immaterial and the objection properly sustained by the trial Court.

With respect to the proceedings at page 347, Transcript of Record (Appellants' Brief 49) immediately following the sustaining of the objection by the Court we find the following:

> "Your Honor—the Court, it is hearsay; wouldn't be admitted."

We once again state that no prejudice resulted to the plaintiffs as a result of the Court's ruling inasmuch as Mr. Baxter, at page 353, Transcript of Record, very artfully put this testimony before the jury in the following answer:

> "When I went to see Mr. Tubman, Mr. Tubman told me he had written prior to that to Mr. Ross, that the car, as far as they were concerned, was beyond repair, wasn't worth repair."

With respect to the proceedings at pages 348-349, 350 (Appellants' Brief 45, 50, 51 and 52), it is quite evident that plaintiff was not prevented from making his proof in answer to the testimony of Mr. Koebke that the car could be repaired for Five Hundred Dollars in view of Mr. Baxter's answer at page 353, Transcript of Record.

With respect to the proceedings at page 371, Transcript of Record, the Court's attention is called to the stipulation (Sup. to Record) the notice to take deposition (Appellee's Brief, Appendix ii) and the notice of filing depositions (Appellee's Brief, Appendix iii). As is apparent from the Transcript of Record 376-378,

the plaintiffs were represented by their attorney, George Van Roggen, in Whitehorse, who participated in the taking of the deposition and cross-examined the witness Herbert Wheeler.

With respect to the proceedings at page 375, Transcript of Record (Appellants' Brief 52), it is believed that the defendant's Exhibit 6 was competent, relevant and material and that proper identification had been made by the witness, Herbert V. G. Wheeler.

With reference to the proceedings at page 378, Transcript of Record (Appellants' Brief 53-54), the Court's attention is called to the fact that oral notice of the filing of the deposition of Herbert V. G. Wheeler and N. M. Keobke had been filed on December 5 (T.R. 5). It is also significant to note that appellants, through their attorney, George Van Roggen, participated in the taking of the depositions.

It is also interesting to note Mr. Bell's objection at page 378, T.R., as follows:

> "Mr. Bell. We object to that, Your Honor, for the reason it was not based upon any proper or adequate notice and we would not be bound by it."

The Court's attention has previously been called to a stipulation entered into by respective counsel for the parties with reference to the taking of the deposition at Whitehorse (Sup. to Rec.). Plaintiffs contended that this stipulation was binding only with reference to the depositions to be taken on October 31, 1949. However, it is interesting to note that as late as on or about December 9, 1949 when appellee was endeavor-

ing to read the deposition of Donald McLain into evidence, that Mr. Bell was objecting to the reading of this deposition on the ground that insufficient notice had been given and at page 666, Transcript of Record, stated as follows:

> "And I was relying upon my protest to the taking of it without the ten day notice that had been stipulated to."

Certainly if counsel for appellants were justified in relying upon the stipulation providing for ten days' notice counsel for appellee should be entitled to place the same reliance upon the stipulation.

With reference to the proceedings at pages 426-427, T.R., (Appellants' Brief 54), it appears that notice of the taking of the deposition was served (R. 50); that an oral notice of the filing thereof was given (R. 5), and that plaintiffs appeared and participated in the taking of the deposition through their attorney, George Van Roggen (R. 428-429).

With respect to the proceedings at pages 525-526 T.R. (Appellants' Brief 54-55) it does not appear that plaintiff was prejudiced by that part of the proceedings of which he complains inasmuch as the witness thereafter testified as follows:

> "Q. (Mr. Bell). From that map, from your recollection of where the impact took place, that is the point on the road, whether it was on the straight-away or curve, would you state, if you can, look on the map and tell the jury approximately where the point of impact occurred?
>
> A. Yes.

Q. Will you examine the map, study it over now until you are able to point it out?

A. I would say that the impact took place in this part of the road, here (indicating). I wouldn't definitely state any part right there within twenty or thirty feet, because I am not sure. It was a year ago or pretty nearly a year ago when the accident happened, and what makes me believe it was right there, was on account of this fairly straight piece of road here, and the car seemed to come across the road.

Q. Now, will you mark it 20 feet, or what you think is that 20 foot area? Mark it along well, you mark it where you think it was.

A. I don't know just what square this map is —(marking map with red pencil)."

Presumably the purpose of a law suit is to bring the full facts to the jury in order that a determination of the respective rights of the parties may be had thereon. The depositions were taken for the purpose of presenting additional facts to the Court and jury. Appellants were present through their counsel, Mr. Van Roggen and participated in the taking of these depositions. No motion was made to suppress them. Certainly no substantial right of appellants was effected by the Court's rulings.

Rule 29, Federal Rules of Civil Procedure provides:

> "If the party so stipulate in writing, depositions may be taken before any person at any time or place upon any notice and in any manner and when so taken may be used like other depositions."

Appellants have made numerous and various assertions of error. However, they have failed completely to point out or demonstrate wherein they were prejudiced as a result of any of the Court's rulings.

It is incumbent upon one claiming error to show the error and to show that such error was prejudicial to him. Error will not be presumed but must be affirmatively shown.

> *Merryman v. U. S.,* 76 U.S. 592;
> *Boley v. Griswold,* 87 U.S. 486;
> *Fidelity and Deposit Company of Maryland v. Lindholn,* 66 Fed. (2d) 56;
> *Capital Savings and Loan Assoc. v. Olympia National Bank,* 80 Fed. (2d) 561.

Rule 61, Federal Rules Civil Procedure, provides as follows:

> "No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the Court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, nullifying or otherwise discharging a judgment or order unless refusal to take such action appears to the Court not consistent with substantial justice. The Court at every stage of the proceeding must disregard any error or defect in the proceeding which does not effect the substantial right of the parties."

While appellants have endeavored to search the record and to call this Court's attention to certain rul-

ings which they claim were erroneous, they have failed completely to show that they were substantially prejudiced by such rulings. When the matters assigned by appellants are considered in the light of the entire record, it is readily apparent that the Court's rulings were proper and that appellants were not thereby prejudiced.

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**FIFTH ARGUMENT.**

**SPECIFICATION OF ERROR NUMBER FOURTEEN:**

> **The Court erred in allowing one of the jurors to bring into the case the question of insurance, without correcting the remarks of the juror, which question was brought into the case without the fault of the appellants and, which question was brought into the case to the great detriment of the appellants, to their prejudice, and prevented them from obtaining a fair and impartial trial.**

This is the third time this point has been discussed in appellants' brief. It has twice been touched upon in appellee's brief. Inasmuch as there is no merit to appellants' claim of error it would appear that no further argument is necessary. Although appellants assert that this particular question was brought into the case to their great detriment and prejudice and prevented them from obtaining a fair and impartial trial, there has been no such showing and since appellants raised no objection whatsoever in the lower Court their assertion of error is not well founded. It would appear that this question in fact inured to their benefit inasmuch as it could logically be argued that the negative answer given by Herman H. Ross served the purpose of defeating defendant's counterclaim.

If in fact, appellants believe the question to be prejudicial to them and if in fact, they believed that Juror O'Neill had prejudged the case before it was finished it was incumbent upon them to bring such matters to the trial Court's attention at that time and not to wait until an adverse verdict had been returned.

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**SIXTH ARGUMENT.**

**SPECIFICATION OF ERROR NUMBER FOUR:**

> **The Court erred in ordering a consolidation of the causes of action of Herman H. Ross and Martha Cornelia Ross for trial.**

Rule 42 (a), Federal Rules Civil Procedure, reads as follows:

> "Consolidation: When actions involving a common question of law or fact or pleading before the Court it may order a joint hearing or trial of any or all the matters in issue in the actions; it may order all the actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid necessary costs or delay."

> "A motion for consolidation for trial of similar cases is addressed to the sound discretion of the court."
>
> *Williams S. S. Co., Inc. v. Wilbur, et al.*, 9th Cir. 9 Fed. (2d) 622.

In *Paulson v. Louisiana, Arkansas, and Texas Transportation Company*, 7 Fed. Rules Dec. 784, it was held:

> "In an action for damages where damages were sought in several cases arising out of an automo-

bile collision and the issues of fact and applicable principles of law were the same in both cases, except the added principles of law that under certain conditions negligence of the driver of the automobile would not be imputed to a guest, defendant's motion to consolidate the actions would be granted as against plaintiff's objection that jury would have so many awards to make in event of consolidation that it would be prone to reduce them all."

In *Pacific Indemnity Express Company v. Union Pacific Railway Company,* 10 Fed. Rules Dec. 61, 62:

> "Actions against a railroad by administrator for death of truck driver and by owner of truck for property damage should be consolidated, though they involve different measures of damage and railroad interposed a counterclaim in action for property damage on ground of negligent operation of truck since a common question of law and fact was involved and identical evidence would be used in each case."

See also:

*Brush v. Harkinen,* 9 Fed. Rules Dec. 604, 605;
*Miller v. Sammacco,* 9 Fed. Rules Dec. 215, 216;
*Gillette Motor Transport, Inc., et al. v. Northern Oklahoma Butane Company,* 10th Cir., 179 Fed. (2d) 711, 712.

The present actions involved a common question of law and fact, there has been no showing that prejudice resulted to appellants by virtue of the order of consolidation and the Court's action in this respect was proper.

### SEVENTH ARGUMENT.

**SPECIFICATION OF ERROR NUMBER TWELVE:**

> **Error of the Court in giving instructions which were objected to by the appellants and exceptions were allowed; all as shown by the records.**

This specification of error does not meet the requirements of Rule 20, 2(d) and should not be considered.

Rule 20, 2(d) reads in part as follows:

> "In all cases, save those of admiralty, a specification of error relied upon which shall be numbered and is set out separately and particularly by error intended to be urged * * * when the error alleged is to the Judge of the Court the specification is set out in part referred to totidem verbis, whether it be in instructions given or in instructions refused, together with the grounds of the objections urged at the trial * * *."

Where specifications of error, complaining of instructions given jury and refusal of other instructions fail to set out the part referred to *totidem verbis,* together with ground of objection urged at the trial, as requested by Court of Appeals, Rule 20, 2(d), specifications were not required to be considered.

*Thiel v. So. Pac. Co.,* 9th Cir., 169 Fed. (2d) 30, 32.

Subsection (c) of Instruction 3 (R. 72) is a correct statement of the law.

*People v. Cassin,* 322 Ill. 276, 278, 153 N.E. 381;

*Oliver v. Kelley,* 300 Ill. App. 487, 491, 21 N.E. (2d) 649.

Instruction No. 4 (R. 72, 73) is taken verbatim from the ordinance of the Yukon Territory, Dominion of Canada. Defendant's Exhibits "A" and "B" purport on their face to be the ordinance of the Yukon Territory, printed and published for the Government of the Yukon Territory, under authority of Chapter 75 of the Consolidated Ordinances of 1914.

Section 58-1-4, Alaska Compiled Laws Annotated, 1949, provides:

> "Printed books or pamphlets purporting on their face to be the Session or other statutes of any of the United States, or the Territories thereof, or of any foreign jurisdiction, and to have been printed and published by the authority of any such State, Territory or foreign jurisdiction, or proved to be commonly recognized in its courts, shall be received in the courts of this territory as prima facie evidence of such statute."

There is no evidence whatsoever on the part of the plaintiffs to overcome the *prima facie* evidence offered by the defendant and in the absence thereof it was proper for the Court to give the instructions now complained of.

Instruction 5 (Tr. 73-75), is a correct statement of law applicable to the case.

With reference to instruction number six (Tr. 75-76-77) appellants have singled out a portion of the instruction and assert that this portion constitutes an instruction by the Court that the jury must find Martha Ross contributorily negligent. From a fair reading of instruction number six in its entirety it is

obvious that the Court correctly instructed the jury that the negligence, if any, of Herman Ross could not be directly imputed to Martha Ross. That under the circumstances, that is, the circumstance of Herman Ross being negligent, before the negligence of Herman Ross could be imputed to Martha Ross, the jury must also find that Martha Cornelia Ross, as a reasonable and prudent individual, should have cautioned Herman Ross against his careless, negligent, driving and carelessly and negligently failed to so caution her husband or by her actions conceded to such careless and negligent driving. This instruction taken as a whole is an accurate statement of the law.

Instruction Number 7-B (R. 78) and Instruction Number 8 (R. 78) correctly state the law. The doctrine of comparative negligence has not been established by rule or statute in the Territory of Alaska and these instructions were proper.

See

15 *Am. Jur.*, Sec. 356, 357, pp. 795-798.

Instruction Number 10 (R. 80) was properly given. It is apparent from the record that the plaintiff had only nominal medical and doctor bills. It also appears that they had not consulted a doctor since about May 1, 1949, just shortly before the time of trial. Herman Ross testified that Dr. Martin had not prescribed a course of treatment but had advised him just to take care of himself. This he had done by taking hot baths and massage treatments (R. 214). From the testimony of Dr. Haggland, an orthopedic specialist, as to the

course of treatment he would have prescribed, had Herman Ross been his patient (R. 812) it is believed that the logical inferences to be drawn from the evidence was that Herman Ross had done very little with respect to his physical condition and the instruction was properly given.

The charge to the jury should be considered as a whole by the Appellate Court with a view to ascertaining, if possible, whether the rights of the complaining party were so prejudiced to prevent a fair trial. If, when so considered, the charge presents the law fairly and correctly to the jury, there is no ground for reversing the judgment, though some of the expressions, when standing alone, might be regarded as erroneous.

3 *Am. Jur.,* Sec. 1097, p. 623.

It is submitted that the instructions of the Court when taken as a whole, fairly and impartially covered the law of the case. The plaintiffs were apparently satisfied with the instructions inasmuch as they requested only two instructions which did not correctly state the law, and took a few general and vague exceptions to the instructions as given.

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## CONCLUSION.

The plaintiffs failed to prove their cases by preponderance of the credible evidence. The jury disbelieved the plaintiffs' theory of the case and did so logically in view of plaintiffs' Exhibit "L" and defendant's Exhibit 15. The plaintiffs selected the place

of trial and vigorously resisted a transfer from Fairbanks to Anchorage. There is no showing that the proceedings were biased or prejudiced against the plaintiffs, nor that there was misconduct upon the part of the jury.

The question relative to insurance was answered voluntarily and without objection by Herman Ross. If this question had any effect on the outcome of the trial it would have been to the benefit of the plaintiffs and to the detriment of the defendant.

The record reflects that regular recesses were taken during the course of the trial irrespective of whether plaintiffs' or defendant's witnesses were being interrogated.

No misconduct of counsel has been shown and the fact that no objections were taken by any of plaintiffs' attorneys is quite conclusive that no misconduct existed.

The matter of the consolidation of the cases was addressed to the sound discretion of the trial Court and there is no showing that this discretion was abused.

The Court's instructions clearly distinguished the two cases and no rights of either plaintiff were prejudiced by the Court's order.

A consideration of the entire record reflects that the Court's rulings as to the admissibility and exclusion of evidence were correct. The record in this case, as in all cases, speaks for itself. Instead of acknowledging the facts reflected by the record the plaintiffs seek to condemn the trial judge, the jury, individual

jurors and appellee's counsel by vitriolic and unfounded assertions. Such condemnation is unwarranted and without basis.

The plaintiffs were given a fair and impartial trial in a forum selected by them. The jury determined the cases adversely to the plaintiffs under proper instructions from the Court. The verdict is supported by substantial evidence and should not now be disturbed.

Dated, Anchorage, Alaska,
February 21, 1951.

Respectfully submitted,
PLUMMER & ARNELL,
By RAYMOND E. PLUMMER,
*Attorneys for Appellee.*

**(Appendix Follows.)**

# Appendix.

PROPOSED AND GENERALLY ADHERED TO BUT NOT YET ADOPTED AS ONE OF THE JOINT RULES.

4. That a new rule shall be added as Rule Number 58, in words and figures as follows, to-wit:

"Rule 58. Attorney fees.

"Unless for good cause, the Court or Judge otherwise determines, the following schedule of attorneys fees will be allowed to the prevailing party in average cases in which attorney's fees are allowed by law, as part of the costs or disbursements:

LIEN CASES

| Contested | Percent | Non-Contested |
|---|---|---|
| $1.00 to $1,000 | 30% | 20% |
| next $4,000 | 15% | 10% |
| next $5,000 | 5% | 3% |
| 10 to $15,000 | 2% | 1% |
| 15 to $25,000 | 1% | .5% |
| over $25,000 | .5% | .25% |

NON-LIEN CASES

| Contested | Percent | Non-Contested |
|---|---|---|
| $1.00 to $1,000 | 25% | 15% |
| 1,000 to $2,000 | 15% | 10% |
| 2,000 to $3,000 | 10% | 7.5% |
| 3,000 to $4,000 | 5% | 2% |
| 4,000 to $5,000 | 5% | 1% |
| 5,000 to $10,000 | 2% | .5% |
| 10 to $25,000 | 1% | .5% |
| over $25,000 | .5% | .25% |

Quiet Title, Replevin, and Ejectment suits to be the same as lien suits and based upon value of property.

Divorce suits: Contested $250.00; Uncontested, $150.00."

Endorsed
Filed in the District Court, Territory of Alaska, 4th Div., Nov. 9, 1949.
John B. Hall, Clerk,
By Olga T. Steger,
Deputy.

In the District Court for the Territory of Alaska, Fourth Division

| | |
|---|---|
| Herman H. Ross, Plaintiff, vs. The British Yukon Navigation Company, Ltd., a Corporation, Defendant. | No. 6113 |

## Notice of Taking Deposition

To: Herman H. Ross, plaintiff, and to Bailey E. Bell, of counsel for plaintiff:

You will please take notice, that pursuant to the stipulation previously entered into between counsel for the respective parties, that the defendant herein will take in the above-entitled action, to be used as authorized by the Federal Rules of Civil Procedure, the depositions of Morris Matevick; Johnny Sirman; Rose Sirman; Ted Geddis; George McNair; Mrs. George McNair; Jack Cherry; Norm Hartnell; Charles Edward Baxter; Harry Beatty; and John Doe, all of whom reside at Whitehorse, Yukon Territory, Dominion of Canada, before Williard L. Phelps,

or before some other Notary Public to be agreed upon by counsel for the parties, the said Williard L. Phelps being a Notary Public for the Yukon Territory, Dominion of Canada, and who is not of counsel or attorney for either of the parties to, nor a relative or employee of such counsel or attorney, nor interested in this cause, on the 18th day of November, 1949, at 10:00 a.m. in the forenoon of that day, and thereafter from day to day as the taking of the deposition may be adjourned, at the office of the said Williard L. Phelps, at Whitehorse, Yukon Territory, at which time and place you are hereby notified to appear and take such part in said examination as you may be advised and as shall be fit and proper.

Dated at Anchorage, Alaska, this 7th day of November, 1949.

Plummer & Arnell,
By /s/ Raymond E. Plummer,
Attorneys for Defendant.
220 Central Building,
Box 499,
Anchorage, Alaska.

Service of the above notice admitted this 7th day of November, 1949.

Bailey E. Bell, by mdb,
Of Counsel for Plaintiff.

Endorsed
Filed in the District Court, Territory of Alaska, 4th Div., Dec. 3, 1949.
/s/ John B. Hall, Clerk.

In the District Court for the Territory of Alaska, Fourth Division

| | |
|---|---|
| Herman H. Ross, Plaintiff, vs. The British Yukon Navigation Company, Ltd., a Corporation, Defendant. | No. 6113 |

NOTICE

To: Herman H. Ross, plaintiff, and Bailey E. Bell, of counsel for plaintiff:

You are hereby notified that we have been informed by John B. Hall, Clerk of the District Court, Fourth Division, that the deposition of Charles Edward Baxter, Mrs. Marie McNair, John Cherry, Maurice Matwick, John Sirman, Mrs. Rose Sirman, Harry Beattie, and Herbert V. G. Wheeler, which were taken at Whitehorse, Yukon Territory, on the 18th day of November, 1949, have been filed with his office.

Plummer & Arnell,
By /s/ Raymond E. Plummer,
Attorneys for Defendant.
220 Central Building,
Box 499,
Anchorage, Alaska.

Service by receipt of a copy of the foregoing Notice is hereby acknowledged this 1st day of December, 1949.

Bailey E. Bell by mdb,
Of Counsel for Plaintiff.

Endorsed
Filed in the District Court, Territory of Alaska, 4th Div., May 10, 1950.
John B. Hall,
Clerk.

In the District Court for the Territory of Alaska, Fourth Division

| | |
|---|---|
| Herman H. Ross, Plaintiff, vs. The British Yukon Navigation Company, Ltd., a Corporation, Defendant. | No. 6113 |

NOTICE OF TAXATION OF COSTS

To: Bailey E. Bell, of counsel for the above-named plaintiff:

Please take notice that the attached bill of costs in in the above-entitled cause will be taxed before the Clerk of said Court at his office in Fairbanks on the 12th day of May, 1950, at 10:00 A.M. on said date.

Dated at Anchorage, Alaska, this 4th day of May, 1950.

Plummer & Arnell,
By /s/ Raymond E. Plummer,
Attorneys for Defendant.
220 Central Building.
Anchorage, Alaska.

Service of the foregoing Notice of Taxation of Costs by receipt of copy hereof acknowledged on this 4th day of May, 1950.

Bailey E. Bell by MDB,
Of Attorneys for the Plaintiff.

Endorsed

Filed in the District Court,
Territory of Alaska, 4th
Div., Nov. 25, 1949.

John B. Hall, Clerk,
By Olga T. Steger,
Deputy.

In the District Court for the Territory of Alaska,
Fourth Division

| | |
|---|---|
| Martha Cornelia Ross, Plaintiff, vs. The British Yukon Navigation Company, Ltd., a Corporation, Defendant. | No. 6129 |

NOTICE OF TAKING DEPOSITION

To: Martha Cornelia Ross, plaintiff, and to Bailey E. Bell, of counsel for plaintiff:

You will please take notice, that pursuant to the stipulation previously entered into between counsel for the respective parties, that the defendant herein will take in the above entitled action, to be used as authorized by the Federal Rules of Civil Procedure, the deposition of N. M. Keobke, of Whitehorse, Yukon Territory, upon oral interrogatories, before Williard L. Phelps or before some other Notary Public to be agreed upon by counsel for the parties, the said Williard L. Phelps being a Notary Public for the Yukon Territory, Dominion of Canada, and who is not

of counsel or attorney for either of the parties to, nor a relative or employee of such counsel or attorney, nor interested in this cause, on the 2nd day of December, 1949, at the office of the said Williard L. Phelps, at Whitehorse, Yukon Territory, at the hour of 10:00 a.m. in the forenoon, at which time and place you are hereby notified to appear and take such part in said examination as you may be advised and as shall be fit and proper.

Dated at Anchorage, Alaska, this 21st day of November, 1949.

Plummer & Arnell,
By /s/ Raymond E. Plummer,
Attorneys for Defendant.
220 Central Building,
Box 499,
Anchorage, Alaska.

Service of the above notice admitted this 21st day of November, 1949.

Bailey E. Bell by m.d.b.,
Of Counsel for Plaintiff.

Endorsed
Filed in the District Court, Territory of Alaska, 4th Div., Dec. 3, 1949.
/s/ John B. Hall,
Clerk.

In the District Court for the Territory of Alaska, Fourth Division

| | |
|---|---|
| Martha Cornelia Ross, Plaintiff,<br>vs.<br>The British Yukon Navigation Company, Ltd., a Corporation, Defendant. | No. 6129 |

NOTICE

To: Martha Cornelia Ross, plaintiff, and Bailey E. Bell, of counsel for plaintiff:

You are hereby notified that we have been informed by John B. Hall, Clerk of the District Court, Fourth Division, that the deposition of Charles Edward Baxter, Mrs. Marie McNair, John Cherry, Maurice Matwick, John Sirman, Mrs. Rose Sirman, Harry Beattie, and Herbert V. G. Wheeler, which were taken at Whitehorse, Yukon Territory, on the 18th day of November, 1949, have been filed with his office.

Plummer & Arnell,
By /s/ Raymond E. Plummer,
Attorneys for Defendant.
220 Central Building,
Box 499,
Anchorage, Alaska.

Service by receipt of a copy of the foregoing Notice is hereby acknowledged this 1st day of December, 1949.

Bailey E. Bell by beb jr.,
Of Counsel for Plaintiff.

Endorsed
Filed in the District Court, Territory of Alaska, 4th Div., May 10, 1950.
John B. Hall,
Clerk.

In the District Court for the Territory of Alaska, Fourth Division

| | |
|---|---|
| Martha Cornelia Ross, Plaintiff, vs. The British Yukon Navigation Company, Ltd., a Corporation, Defendant. | No. 6129 |

NOTICE OF TAXATION OF COSTS

To: Bailey E. Bell, of counsel for the above-named plaintiff:

Please take notice that the attached bill of costs in the above-entitled cause will be taxed before the Clerk of said Court at his office in Fairbanks on the 12th day of May, 1950, at 10:00 A.M. on said date.

Dated at Anchorage, Alaska, this 4th day of May, 1950.

Plummer & Arnell,
By /s/ Raymond E. Plummer,
Attorneys for Defendant.
220 Central Building,
Anchorage, Alaska.

Service of the foregoing Notice of Taxation of Costs by receipt of copy thereof acknowledged on this 4th day of May, 1950.

Bailey E. Bell, by MDB,
Of Attorneys for the Plaintiff.

In the District Court of the District of Alaska, Fourth Judicial Division

United States of America,
District of Alaska
Fourth Judicial Division } ss.

CERTIFICATE

I, JOHN B. HALL, Clerk of the District Court of the District of Alaska, Fourth Judicial Division, hereby certify that the foregoing and hereto attached six pages of typewritten matter, constitute a full, true, and complete copy, and the whole thereof, of the NOTICE OF TAKING DEPOSITION to Herman H. Ross & Bailey E. Bell re taking depositions of Matevick, et al.; NOTICE to Herman H. Ross & Bailey E. Bell re depositions Baxter et al. on file Clerk's office; and NOTICE OF TAXATION OF COSTS in Cause No. 6113, entitled HERMAN H. ROSS, Plaintiff versus THE BRITISH YUKON NAVIGATION COMPANY, LTD., a Corporation, Defendant, AND NOTICE OF TAKING DEPOSITION to Martha Cornelia Ross & Bailey E. Bell re taking deposition of Keobke; NOTICE to Martha Cornelia Ross & Bailey E. Bell re deposition of Baxter et al. on file in Clerk's office; AND NOTICE OF TAXATION OF COSTS in Cause No. 6129, entitled MARTHA CORNELIA ROSS, Plaintiff versus THE BRITISH YUKON NAVIGATION COMPANY, LTD., a Corporation, Defendant.

IN WITNESS WHEREOF I have hereunto set my hand and seal of the above-entitled Court this 22nd day of January, 1951.

(Seal) JOHN B. HALL, Clerk,
By OLGA T. STEGER, Deputy.